NO. 89-327

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIS LUCAS, ET AL
Petitioners

VS.

LLOYD'S LEASING, ET AL
Respondents

VS.

CONOCO, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the owner/operator of an oil tanker afloat 70 miles from Galveston Island owe the island's beachfront residents and businesses a duty of care to prevent a massive oil spill?

(2) When the M/V Alvenus spilled 2.6 million gallons of oil into the Gulf of Mexico, 11 miles offshore and 70 miles from Galveston Island, was the risk of harm to beachfront property so unforeseeable as to place it beyond the scope of Respondents' legal duty of care to prevent massive oil spills?

(3) Did the scope of Respondents' duty to prevent massive oil spills extend to harm caused by people "tracking" the oil from Galvestson beaches to adjacent homes and businesses?

(4) Was it proper for the Fifth Circuit to reject the district court's basis for summary judgment, then affirm on grounds not advanced or argued before the district court?

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Petitioners certifies that the following is a complete list of all parties:

Petitioners:

Petitioners (Plaintiffs below) are 135 individuals and businesses directly harmed by the tracking of oil off from Galveston beaches. They are listed in Appendix E.

Respondents:

1. Lloyds Leasing, Ltd.
2. Cammell Laird Shipbuilding, Ltd.
3. Alvenus Shipping Company, Ltd.
4. Conoco, Inc.
5. Lake Charles Pilots, Inc.
6. Malcolm Gillis, Pilot
7. Mitchell Energy & Development Corp.
8. Mitchell Realty, Inc.
9. State of Texas.
10. Ms. Leonore M. Gutierrez Doody
11. Bob White, et al

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TO THE HONORABLE UNITED STATES SUPREME COURT:

Come now, Petitioners and seek Writ of Certiorari to the Fifth Circuit's April 4, 1989 judgment and May 19, 1989 order refusing rehearing and pray that same issue in these regards.

OPINIONS BELOW

The Fifth Circuit Opinion, reported at ____F.2d____ (5th Cir. 1989), is attached as Appendix A. The Court's

order denying the Motion for Rehearing is attached as Appendix B. The district court's Memorandum and Order, reported at 697 F.Supp. 289 (S.D. Tex. 1987), is attached as Appendix C.

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Fifth Circuit entered judgment on April 4, 1989 and denied Petitioners' motion for rehearing on May 19, 1989.

FEDERAL STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

-A-

On July 30, 1984, M/T Alvenus ran aground just off the coast, 11 miles from Cameron, Louisiana. The grounding cracked the Alvenus' hull, producing a massive oil spill of 2-3 million gallons of heavy crude oil and tar. The U.S. Coast Guard expressed concern for damage to Galveston as early as the first day after the spill. U.S. Coast Guard landfall predicitions varied in the early hours after the oil spill, but on August 2nd, the Coast Guard issued an alert to Galveston and Respondents at bar set up a command post in Galveston and began hiring clean up crews. On August 4, 1984, the Alvenus' oil washed ashore in Galveston and continued to do so for over a month, causing enormous damage at the height of Galveston's summer tourist season.

-B-

Respondents at bar filed this limitation of liability

action per 46 U.S.C. 183. thereafter, over 375 claimants (among them Petitioners at bar) filed claims for damages caused by the massive oil spill. Respondents at bar moved for summary judgment and Petitioners responded. Respondents at bar did not raise foreseeability — the basis of the trial court's ultimate order and the 5th Circuit's decision — in their summary judgment motion. Their foreseeability argument came in a Reply to Petitioners' Response to Respondents' Motion for Summary Judgment.

The trial court entered partial summary judgment as to certain *claims* made by the "tracking damage" claimants (Petitioners), who moved to reconsider. On January 22, 1988, the trial court modified its earlier order, dismissing the "tracking damage" claimants themselves, despite substantial summary judgment proof that "tracking damage" from the massive oil spill was "highly probable". The gist of the trial court summary judgment was that "tracking" oil from the beaches into Petitioners' homes and businesses was not foreseeable. In its January 22 order, the trial court invited Petitioners to file another motion to reconsider, which was done. By order of April 14th, the trial court denied same. Harboring significant doubts, however, the trial court also *ordered* Petitioners to file an interlocutory appeal per 28 U.S.C. 1292(b).

On April 25, 1988, they did so. The 5th Circuit, by order of June 7, 1988, denied the interlocutory appeal[1] but held that the matter was, in any event, "appealable as of right". Appeal was thereafter docketed and timely proceeded. On April 4, 1989, the 5th Circuit reversed the trial court's holding but affirmed summary judgment per

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[1] "(T)he (trial) court did not properly certify the order appealed from as required by §1292(b)".

curiam, Judge Higginbotham concurring and dissenting in part. Suggestion for Rehearing En Banc and Motion for Rehearing timely followed, being denied on May 19, 1989. Application for Writ to this Honorable Court timely followed.

GROUNDS FOR GRANTING WRIT

Pursuant to Rule 17, there are special and important grounds for granting Writ:

(1) The 5th Circuit has decided questions of federal law which have not been, but should be, settled by this Honorable Court.

(a) Whether the owner/operator of an oil tanker afloat 70 miles from coastal communities owes the residents and businesses of those communities a duty of care to prevent massive oil spills?

(b) Whether the winds and tides that bring massive oil spills ashore constitute intervening causes that break the chain of foreseeability and preclude liability for resulting harm?

(c) Whether the fact that a coastal region is not fully developed provides a reason to conclude that the owner/operator of an oil tanker owes no duty to coastal communities in that region?

(d) Whether people tracking oil from beaches to adjacent homes and businesses constitutes an intervening cause that breaks tshe chain of foreseeability and precludes liability for resulting harm?

(e) Whether the ultimate destination of a

massive offshore oil spill must be predictable with certainty before there can be liability for resulting damages?

(f) Whether a 1-in-5 probability that a massive oil spill will drift to a heavily populated area renders that likelihood so unforeseeable as to preclude liability for resulting damages?

(2) The 5th Circuit decision, deciding a complex case of far-flung import on summary judgment, conflicts with guidance from *Kennedy v. Silas Mason*, 334 US 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 US 242, 255 (1986) and *Arenas v. U.S.*, 322 US 419, 434 (1944).

(3) The 5th Circuit decision conflicts with the doctrine of foreseeability applied in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), as well as *Consolidated Aluminum Corp. v. C.F. Bean*, 833 F.2d 65 (5th Cir. 1987) and *State ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1986).

(4) the 5th Circuit has sanctioned a gross departure from Fed.R.Civ.P. 56.

ARGUMENT AND AUTHORITIES

I

Generally

The 5th Circuit called for "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. *(Slip. Op.*, 2714 — Higginbotham, J., concurring and dissenting). Given the exoneration of an entire industry, the panel majority impacts far beyond this case and this oil spill. The absolution of the shipping industry

will discourage industry efforts towards greater safety measures, oil spill containment technology and mechanisms to predict oil spill landfall. What rational shipping executive would invest time and money in such matters, where to do so might remove an unbeatable defense to any liability at all?

II

Fifth Circuit's "Far-Reaching Exoneration of Shipping Industry From Responsibility" for Massive Oil Spills — Summary Judgment Contrary to Sound Public Policy

Judge Higginbotham accurately assessed the 5th Circuit's holding as calling for "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. (*Slip Op.*, 2714 — Higginbotham, J., concurring and dissenting in part).

Massive oil spills present complex issues of profound public import. These incidents visit heavy damage on a legion of individuals and impact business, quality of life, local/regional economy and the environment. Additionally, safety standards and rules, and accountability are implicated. This case (and that presented by the recent Alaska spill[2]) stand as examples.

This Honorable Court has repeatedly cautioned *against* summary disposition of cases involving complex issues of profound public import:

> *(S)ummary Judgment procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of*

---

[2] The Alaska oil spill was characterized by the Court setting the Captain's bond as the worst disaster since Hiroshima.

> *far-flung import.* . . . We consider it . . . good judicial administration to withhold decision of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.
>
> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be *lacking in the thoroughness* that should precede judgment of this importance and which it is the purpose of the judicial process to provide. (emph. added).

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (citing *Silas* with approval); *Arenas v. U.S.*, 322 U.S. 419, 434 (1944) ("duty of court . . . can be discharged in a case of this complexity only by trial. . . . ", reversing summary judgment)[3]

The wisdom of this cautionary principle is seen at bar. On a record developed only by affidavit and legal argument, 135 Petitioners heavily damaged in a massive oil spill are precluded from relief — despite 5th Circuit agreement that the "tracking damage" they suffered was a foreseeable and probable result of the presence of oil on Galveston beaches. With the 5th Circuit opinion as precedent, an oil tanker owner/operator may be absolved from liability simply with an affidavit swearing an inability to predict exactly where the oil spill "bullet" would hit. Issues of profound public import — such as massive oil spills — should not be decided by affidavit in a summary

---

[3] This is also the 5th Circuit rule. *U.S. v. Fryd Constr. Corp.*, 423 F.2d 980, 984 (5th Cir. 1970); *Heywood v. Pub. Housing Administration*, 238 F.2d 689, 698 (5th Cir. 1956).

judgment procedure.

Petitioners have no quarrel with the principle of "foreseeable risk" employed by the 5th Circuit to determine the scope of Respondent's duty of reasonable care. That principle limits a tortfeasor's responsibility to:

> harm of a general sort to persons of a general class which might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention.

Slip Op., 2713, quoting from *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68 (5th Cir. 1987). Surely, Respondents might have anticipated the likelihood that spilling two to three million gallons of oil so near the coast would damage coastal businesses and other beachfront property. One day after the spill, the Coast Guard raised concerns about damage to Galveston and its staff met with Galveston officials to take protective measures.

However, the 5th Circuit exonerated Respondents, concluding that there was no reason to anticipate that the oil would reach a "heavily populated area". This conclusion was derived from the fact that the spill occurred 70 miles from Galveston and that only 60 miles of 340 miles of coastline from Calcasieu, Louisiana to the Mexican border was "developed". According to Justice Higginbotham, this reasoning:

> calls for far-reaching exoneration of the shipping industry from responsibility to the gulf coast, making curious indeed our effort in the *Testbank* line of cases to adopt a pragmatic limitation on the doctrine of foreseeability. *Slip. Op.*, 2714.

"Stripped to essentials", the 5th Circuit holds that vessel owners "owe no duty shoreward" — at least not to residents of the Texas coast. *Id.* So long as the oil tanker is far enough from the Texas coast that an oil spill might make landfall in an undeveloped area, the vessel owner owes no duty of care to Texans. Stated differently, unless and until Texas chooses to fully develop its coastline, owners of tankers in the Gulf owe no duty to coastal residents. This narrow concept of legal duty conflicts with the views of this Court, as well as other federal circuits, including the Fifth Circuit itself.

In *Union Oil Co. v. Oppen*, 501 F.2d 558, 569 (9th Cir. 1974), the 9th Circuit held that damage caused to coastal fishermen — when "vast quantities of raw crude oil were released and subsequently carried by wind, wave and tidal currents over vast stretches of . . . coastal waters . . ." was foreseeable. The crucial consideration for the 9th Circuit was not whether it could be predicted exactly where the oil would drift. Rather, foreseeability resided in the fact that defendants could reasonably foresee that negligently conducted drilling operations "might diminish aquatic life and . . . the business of commercial fishermen". As the court said, "The dangers of pollution were and are known even by school children." *Id.*, at 569. Similarly, Respondents at bar could reasonably foresee that spilling 2-3 million gallons of oil 11 miles from the Gulf Coast might adversely impact on a populated coastal community. The U.S. Coast Guard certainly did! *See also, Arizona Copper Co. v. Gillespie*, 230 US 46, 57 L.Ed. 1384 (1912) (riparian owner may recover property damage caused by pollution 25 miles upstream).

The 5th Circuit has generally adopted a more liberal stand regarding foreseeability in the context of admiralty cases. For example, in *Horton & Horton, Inc. v. T/S J. E.*

DYER, 428 F.2d 1131, 1135 (5th Cir. 1970), the court made the following comment about foreseeability and intervening causation:

> In determining causation in maritime matters, the applicability of such doctrines as . . . interruption of negligence by a subsequent intervening negligence is questionable. "[T]he maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party."

Gilmore & Black, *The Law of Admiralty*, p. 404 (1957). See also, *Commercial Transport Corp. v. Martin Oil Service*, 374 F.2d 813, 817 (7th Cir. 1970).

IV.

THIRD PARTY HUMAN INTERVENTION: "TRACKING DAMAGE" WAS "VERY COMMON", "VERY LIKELY" AND "HIGHLY PROBABLE" – NOT "HIGHLY EXTRAORDINARY" AS A MATTER OF LAW

The trial court held that "tracking damage" was not recoverable because third party human intervention (those who tracked oil off the beaches) broke the causal chain of foreseeability (Ex. C — Order of 1/22/88, at 4). The 5th Circuit, however, disagreed with the trial court and held that "tracking damage" was a "common sense conclusion"[4], agreeing with Petitioners that "tracking damage" was probable and foreseeable.[5]

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[4] *Slip, Op.*, at 2713.

[5] *Id.*, at 2713-14. Petitioners presented expert affidavits below that establish "tracting damage" from a massive oil spill as "common", "very likely" and "highly probable". (Tr. 1165-76 — U.S. Coast Guard

Nunley v. M/V Dauntless, 727 F.2d 455 (5th Cir. 1984) adopted *Rest. of Torts* 2d §§442, 447. There, the 5th Circuit held that the negligence of an intervening third party does *not* break the causal chain if:

> (a) the actor at the time of his negligent conduct should have realized that a third party person might so act (i.e., track oil off the beach into Appellants' homes and businesses), *or*
>
> (b) a reasonable man knowing the situation existing when the act of a third party was done (i.e., when the oil was tracked off the beaches into Appellants' homes and businesses) would not regard it as *highly extraordinary* that the third party would so act, *or*
>
> (c) the intervening act (i.e., tracking oil off the beach into Appellants' homes and businesses) as a normal consequence of a situation created by the actor's conduct in a matter in which it is done is not *extraordinarily negligent.*

Id, at 464-5.

Given the summary judgment proof that "tracking damage" from massive oil spills was "common" and "highly probable" (Tr. 1165-76), it cannot be said — as a matter of law — that the "tracking damage" at bar was so "highly extraordinary" as to break the causal chain. It would have been extraordinary had "tracking damage" not occurred! The inconsistency of the 5th Circuit with *Nunley*

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[5] continued. Veteran of 20 years experience in oil spill investigation and clean-up, president of oil spill clean-up company involved in over 100 oil spills, college professor training oil spill clean-up personnel for 11 years, etc.).

guidelines introduces uncertainty into an already complicated field of law.

Watz v. Zapata Offshore Co., 431 F.2d 100 (5th Cir. 1970) adopted *Rest. of Torts* 2d §435(i), holding that

> if the actor's conduct is a substantial factor in bringing about the harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred *does not* prevent him from being liable. (emph. added).

Id, at 116. the conduct at bar was Respondents' negligence producing a massive oil spill on the Gulf Coast — obviously a "substantial factor" in bringing about Petitioners' harm. Under *Watz*, Respondents cannot be absolved, even if *(arguendo)* they did not foresee the "common" and "highly probable" tracking of oil off the beaches into Petitioners' homes and businesses.

V

THE 5TH CIRCUIT'S NEW TEST

The 5th Circuit misconstrued the proper "foreseeability" test.[6] In a nutshell, it held that Petitioners' harm was not foreseeable as a matter of law — because Respondents could not predict that individuals and businesses would probably be harmed. Under this new

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[6] The 5th Circuit agreed that "Appellee [Respondents] might reasonably anticipate that the oil might wash ashore somewhere. . . . " (*Slip Op.*, 2713) but concluded that since the precise coastal point to be hit by the oil spill "bullet" was not foreseeable, neither was the harm. (*Id*). Thus, the 5th Circuit reasoned that — since Respondent did not precisely know that the oil spill would wash ashore in Galveston — Petitioners' harm was not foreseeable and Respondents were absolved of liability.

standard, a defendant shooting a gun into a crowd would be absolved from liability because he did not know precisely who the bullet would hit![7] This is not the correct "foreseeability" test.

The 5th Circuit cited the correct test,[8] but misapplied and re-wrote it. As announced in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987):

> harm . . . (is) . . . foreseeable . . . if (1) harm of a *general* sort (2) to persons of a *general* class (3) *might* have been anticipated by a *reasonably thoughtful* person, (4) as a *probable* result of the act or omission, (5) considering the interplay of *natural forces* and *likely human intervention*. (numbering and emph. added).

The 5th Circuit based its decision on the "persons of a general class" element,[9] reasoning that if oil spill landfall at Galveston was not *predicted with certainty*, then — as a matter of law — harm to the Galveston Petitioners was not foreseeable. This "certainty" requirement is *not* the *Consolidated* standard; it is a new, incorrect standard, deleting *Consolidates's* "general class" element and substituting an onerous "predictable with certainty" element.

Consolidated requires that harm of some type ("a general sort") "might have been anticipated" to be visited upon "persons of a general class". That "general class" is

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[7] *Slip. Op.*, 2714 (Higginbotham, J., concurring and dissenting).

[8] *Slip. Op.*, 2713, citing *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987).

[9] *Slip. Op.*, 2713.

Gulf Coast residents and businesses.[10] *Consolidated* does not require the victims to be identified with exactitude — prior to the oil spill landfall — but only that the "general class" of victims potentially to be harmed be identifiable. *cf: State of La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc) (noting that a general class of "commercial fishermen were foreseeable, Plaintiffs whose interests . . . (Defendant) had a duty to protect. . . .").

Under the 5th Circuit's new standard, "foreseeability" now requires that oil spill victims be identified prior to landfall. Under the *Consolidated* "foreseeability" standard, however, the "general class" element is met by simply demonstrating "anticipation" of landfall along the Gulf Coast, the "general class" being persons and businesses in that "general" area. Indeed, the "data" relied on by the 5th Circuit reflects a 1-in-5 probability for the oil spill "bullet" to hit populated Gulf areas like Galveston, establishing a 1-in-5 probability of harm to Petitioners.[11] More exactitude than even a 1-in-5 probability of harm is now required! This is not *Consolidated's* "general class" element; it is something new and onerous — and an exoneration of the shipping industry from responsibility for massive oil spills.[12] *cf: Testbank, supra* at 1032-3 (Gee, J., concurring).

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[10] *Consolidated* dealt with persons and businesses suffering harm up to *6 miles* inland; Petitioners at bar suffered harm within *300 yards inland.*

[11] *Slip. Op.*, at 2713 (reflecting 340 miles of coastline, 60 miles being populated like Galveston). Indeed, landfall at Galveston was by the third day after the spill — 2 days before it washed ashore. *Coast Guard Report* (4/23/85), pp. 6-7.

[12] *Slip. Op.*, 2713 (Higginbotham, J.r, concurring and dissenting).

The risk at bar is damage due to tracking oil off the beaches into homes and businesses. This risk (as all panel members agreed — *Slip Op.*,2713-14) was foreseeable and probable. Indeed, Petitioners tendered expert testimony that "tracking damage" was a "common", "very likely" and "highly probable" result of a massive oil spill. (Tr. 1165-76). The 5th Circuit however, extended *Consolidated* to exonerate the shipping industry in almost all oil spills (Slip. Op., 2714). The new standard adds an extra (and near insurmountable) layer atop the "foreseeability" test — to avoid summary judgment. One must now establish as a matter of law that the oil spill's precise landfall was predictable. Foreseeability does not require a crystal ball.

VI

ONE-IN-FIVE PROBABILITY — NOT ENOUTH FORESEEABILITY AS A MATTER OF LAW?

The 5th Circuit, contrary to *Consolidated's* "general class" element, now requires oil spill landfall to be predicted with certainty before harm is "foreseeable". The import of the 5th Circuit decision is that a 1-in-5 probability[13] of harm is insufficient to raise a fact issue to bar summary judgment in this case of profound public import. A 1-in-5 probability of harm more than meets *Consolidated's* "general class" of victims elements. A 1-in-5 probability of harm does not establish — as a matter of law — that harm was not "FORESEEABLE".

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[13] *Slip. Op.*, 2713 (340 miles of coastline, 60 miles being populated, yields an approximate 1-in-5 probability of oil spill landfall.

VII

THE ULTIMATE IRONY: TRIAL COURT: OIL HITTING GALVESTON IS FORESEEABLE BUT "TRACKING DAMAGE" IS NOT; 5TH CIRCUIT — "TRACKING DAMAGE" IS FORESEEABLE BUT OIL HITTING GALVESTON IS NOT

This case presents the ultimate irony. The trial court held Petitioners' "*tracking damage*" was not foreseeable,[14] although it *was* foreseeable for the oil spill "bullet" to hit Galveston. The trial court allowed certain classes of Galveston Claimants to recover for direct physical harm and for damages due to oil-laden windblown mist. The 5th Circuit, contrary to the trial court, agrees that "tracking damage" *was* foreseeable[15] but — going beyond the trial court decision on a matter *no one* appealed — held that oil on Galveston beaches from the massive oil spill *was not* foreseeable![16] Judge Higginbotham noted the distinction between the decision appealed from and the basis of the 5th Circuit's ruling (*Slip Op.*, 2713-4 — i.e., trial court found "*tracking damage*" not foreseeable (which all panel members disagree with) but majority found *oil spill landfall at Galveston* not foreseeable). The ultimate irony is

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[14] App. C — (Order of 1/22/88 at 4):

> "as a matter of law, . . . the damages . . . resulting from the *tracking of oil* were not foreseeable.*** (T)he damages were indeed possible but in no fashion probable. The element of third party intervention that allowed the oil to be carried *from the beaches* to claimants' foreseeability". (emph. added).

[15] *Slip. Op.*, 2713. Judge Higginbotham (concurring and dissenting) also agrees that Petitioners' "tracking damage" was foreseeable (*Slip. Op.*, 2714).

[16] *Slip Op.*, 2713.

that the 5th Circuit opinion turns on a ruling below from which *no one* appealed! Petitioners obviously did not challenge any ruling that it was foreseeable for the oil spill "bullet" to hit Galveston; Respondents filed no cross-appeal and no cross-points.

CONCLUSION

The 5th Circuit, discarding *Testbank* and *Consolidated*, presents "far-reaching exoneration of the shipping industry from responsibility" for massive oil spills. *(Slip Op.*, at 2714 — Higginbotham, J., concurring and dissenting). Thus, the import of its opinion reaches far beyond this case and this oil spill. So long as tanker owners/operators can claim inability to predict oil spill landfall with certainty, oil spill harm is not "foreseeable" as a matter of law, absolving them of liability. In policy terms, such a state of law will hardly encourage industry efforts toward greater safety measures, oil spill containment technology and techniques of predicting oil spill landfall. Indeed, a rational industry executive would be *discouraged* from investing time and money in such critical areas, because to do so might remove an unbeatable defense to liability.

The 5th Circuit presents a new "foreseeability" standard, abandoning *Testbank's* "pragmatic limitation on . . . foreseeability"[17] and *Consolidated's* "general class" of victims element. Contrary to these authorities, the new standard requires oil spill landfall to be predicted with certainty before oil spill harm may be "foreseeable". This onerous

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[16] *Slip Op.*, 2713.

[17] *Slip. Op.*, 2714 (Higginbotham, J., concurring and dissenting). Judge Higginbotham authored *Testbank*.

standard would absolve the industry from almost all oil spills, as it would absolve one from liability for shooting into a crowd where one could not predict who the bullet would hit. *Slip Op.*, at 2714).

the 5th Circuit recites data reflecting a 1-in-5 probability that the oil spill "bullet" would harm populated Gulf areas like Galveston. Even a 1-in-5 probability of harm is not enough" foreseeability" of harm — as a matter of law — under the new standard! Besides a divergence from the law, a 1-in-5 probability of harm, at the least, presents a fact question as to the foreseeability of harm, barring summary judgment.

WHEREFORE PREMISES CONSIDERED, Petitioners pray that the Petition be granted, the Fifth Circuit Opinion regarding these complaints be reversed and remanded with instructions, costs be assessed against Respondents and for such other relief as may be just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ have been served on opposing counsel on this the 17th day of August, 1989, as follows:

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APPENDIX A

In the Complaint and Petition of LLOYD'S LEASING LIMITED. As Owner, and Cammell Laird Shipbuilding, Ltd., et al.,

Petitioners-Appellees

v.

CONOCO, Claimant-Third Party

Defendant-Appellee

v.

Bob WHITE et al, Claimants-Third Party

Plaintiffs-Appellants.

v.

U.S. ARMY CORPS OF ENGINEERS, Lake Charles Pilots, Inc. and Simrad Subsea, Inc. of Oslo Norway, Third Party

Defendants-Appellees

In the Complaint of Petition of LLOYD'S LEASING LTD., etc., et al.

Petitioners-Appelles

v.

Willis LUCAS, et al., Claimants-Appellants.

Nos. 88-2350, 88-2515.

United States Court of Appeals,
Fifth Circuit.

April 4, 1989.

Owners of property approximately 70 miles from site of ship's grounding filed claims in shipowner's limitation of liability action to recover for damages caused when oil spilled from ship washed ashore and was tracked onto their property by tourists and beachgoers. The United States District Court for the Southern District of Texas. Hugh

Gibson, J., entered summary judgment against property owners, and they appealed. The Court of Appeals held that harm suffered by property owners was not foreseeable. – Affirmed.

Patrick E. Higginbotham, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. SHIPPING 209(15/8)

Issue of whether harm suffered by property owners as result of ship's grounding and resulting oil spill was foreseeable was properly addressed by trial court in limitation of liability proceeding because determinination of tort-feasor's duty and its parameters, including foreseeability, is function of court rather than of jury.

2. SHIPPING 81(1)

Harm suffered by property owners when oil spilled from ship that ran aground was washed ashore apporximately 70 miles from site of grounding and tracked onto property by tourists and beachgoers was not foreseeable; ship owner therefore owed no duty to property owners and property owners' claim were properly dismissed in shipowner's limitation of liability action.

Appeals from the United States District Court for the Southern District of Texas.

Before GEE, HIGGINBOTHAM, and DUHE, Circuit Judges.

PER CURIAM:

In July 1989 the M/T Avenues grounded in the

Calcasieu River Bar Channel about eleven nautical miles south/southeast of Cameron, Louisiana. As a result of the grounding one of the ship's tanks cracked, spilling 65,500 barrels of crude oil into the waters of theGulf of Mexico. Given the particular combination of tides and winds that existed at the time of the spill, the oil washed ashore on Galveston Island, approximately 70 miles west of the site of the grounding.

Following the accident the peteitioners appellees filed an admirality limitation of liability action. Over 375 claimants filed claims against the petitioner and third party defendants. The trial court divided the claimants into four groups based on the type of damages sustained. One of these groups consisted of claimants who suffered damages from oil tracked onto their premises by tourists and beachgoers. The appellants are the members of this group of claimants. In January 1988 the trial court granted the petitioners/appellees' motion for summary judgment as to this group of claimants. The basis for the court's decision was that these claimants were barred from recovery because the damage to them was, as a matter of law, not foreseeable. The appellants contend that the trial court erred in granting summary judgment. Because we agree with the district court's conclusion that the harm suffered by the appellants was not foreseeable we AFFIRM the judgment of the district court.

> The [Supreme] court has stated that Fed.R.Civ.P. 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to this case and on which he bears the burden of proof. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact.

Washington v. Armstrong World Industries, Inc. 839 F.2d 1121 (5th Cir.1988) (citation omitted).

To establish a cause of action based on negligence the plaintiff must establish the existence of four elements. These elements are: "(1) the defendant was under a duty to the plainttiff to use due care, (2) the defendant was guilty of a breach of that duty, (3) the plaintiff has suffered *damages*, and (4) the breach of the duty *proximately caused* these damages." *Morris, Morris on Torts.* 44 (2nd Edition) (emphasis in original). In this case the district court granted the appellees' motion for summary judgment based on its determination that the appellants had failed to establish the existence of one of these elements, i.e., that the defendant had a duty to the plaintiff. This determination was in turn, based on the court's conclusion that the harm suffered by the plaintiff was not foreseeable.

[1,2] The appellants advance two arguments for reversal: First, the foreseeability is a question of fact and should not be decided as a matter of law; Second, that summary judgment was inappropriate because the affidavits of their experts raised a material fact issue.

In *Consolidated Aluminum Corporation v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir.1987) we stated that "[d]etermination of the tortfeasor's duty, and its parameters, is a function of the court. That determination involves a number of factors, including most notably the foreseeability of the harm suffered by the complaining party." (citations omitted) The district court therefore properly addressed the issue of whether the harm suffered by the plaintiff was foreseeable. We must now determine whether it correctly decided that issue.

In *Consolidated Aluminum Corp. supra*, we held that

[d]uty . . . is measured by the scope of the risk that negligent conduct foreseeably entails . . . and marks the limits placed on a defendant's duty . . ." *Id.* at 65. (citation omitted)

The court went on to state that harm is "the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." *Id.* at 68.

Applying this definition, we conclude that the district court's determination that the harm suffered by the plaintiffs was not foreseeable and that the appellees therefore owed no duty to the appellants is correct. The original oil spill occurred seventy (70) miles from Galveston in the Gulf of Mexico. The coastline between Calcasieu, Louisiana, the site of the spill, and Port Isabel, on the Mexico border, extends for approximately 340 miles. Approximately 60 miles of this coastline is developed. To produce the possibility of tracking damages such as these the oil had to wash ashore on a developed shore, where there were people to track it and places to track it into. The appellants' experts testified that tracking damages are a probable consequence of oil spills that wash ashore in inhabited areas, a commonsense conclusion that gains little force when voiced by an expert. Their testimony did not, however, address the probability that this oil spill would wash ashore in such an area. Therefore their testimony does not preclude a grant of summary judgment. While the appellee might reasonably anticipate that the oil would probably wash ashore somewhere, it had no reason to have anticipated that the oil would probably wash ashore in a heavily polulated area and then be tracked into businesses

and homes. "[T]o be found liable a defendant must have 'knowledge of a danger, not merely possible by probable . . .'" *Id.* at 68. (citation omitted).

In light of these facts we conclude that the appellants have failed to establish a requisite element of a negligence action. i.e., that the 'harm to the appellants was foreseeable and that the appellees therefore owed a duty to the appellant. Consequently the district court properly granted the appellees' motion for summary judgment.

The judgment of the district court is

AFFIRMED

PATRICK E. HIGGINBOTHAM.
Circuit Judge, concurring in part and dissenting in part:

The M/V Alvenus ran aground in the Calcasieu Channel Pass off the Louisiana Coast in the Gulf of Mexico. When its hull split it spilled between two and tree million gallons of heavy crude oil and tar approximately eleven nautical miles off the coast. Most of the crude oil floated ashore along the Gulf Coast and the Galveston County area. The predictable result was a significant downturn in the fortunes of surrounding businesses dependent on the tourist trade. Confronted with our opinion in *State of La. ex rel. Guste. v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1989) (en banc) (no recovery of economic losses absent physical injury to a proprietary interest),an innovative group of merchants located in the vicinity of the oiled beach suggest that they suffered the requisite physical injury in that beachgoers, their customers, tracked the sticky oil residue into their businesses. They offered "expert testimony" in opposition to summary judgment for the self-evident proposition that such "tracking" is the

foreseeable consequence of the spill. The district court granted summary judgment concluding that such damage was not foreseeable. The majority here affirm that decision, apparently concluding that it was not foreseeable that the oil would find its way to this beach. With deference, although I am in substantial agreement with the majority over the outcome of this case, I would travel a different path.

In *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68, we explained how foreseeability limits the tortfeasor's duty. We explained that it is "the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention."

I am persuaded that spilling millions of gallons of crude oil into the sea eleven miles off the gulf coast created a direct and foreseeable risk of tainting the coastline. It is no answer that the precise coastal point to be hit was not foreseeable; it is enough that the risk realized be within the set of foreseeable risks. Defendants point to the seventy-mile movement of the spill and the weather and winds that might have brought the oil ashore elsewhere. Stripped to essentials, defendants urge that the vessel owner owed no duty shoreward. This argument calls for far-reaching exoneration of the shipping industry from responsibility to the gulf coast, making curious indeed our effort in the *Testbank* line of cases to adopt a pragmatic limitation on the doctrine of foreseeability.

In *Testbank*, the collision in the Mississippi River blocked river traffic causing "wave upon wave of successive economic consequences" up the river and around it.

We confined recovery for injury to persons who suffered a physical injury to a proprietary interest. For the reasons that we explained there, we refused to allow recovery to extend to the full reach of forseeability.

The defendants in today's case would have us believe that foreseeability encompasses little more that specifically identified and inevitable outcomes. But surely the duty of a person firing a gun into the air in a populated area extends to all persons in the zone of danger of his acts. That is the essence of duty and foreseeability.

The majority understandably balks at the claims of businesses who point to the tracking of oil. I would find the answer in *Testbank*, rather than in a forced reading of foreseeability, for the reasons we there explained. Our insistence upon physical injury to a proprietary interest was a forth-right pragmatic limit on the doctrine of foreseeability. Undoubtedly many persons suffered some foreseeable physical loss and yet were not allowed to recover general economic losses. These physical losses were not a direct consequence of the collision and spill but were the secondary consequences of shipping delays.

Testbank limits which parties can recover for foreseeable injuries. In this appeal, the claimants' only physical injury is two parties removed from the mosts immediate *Testbank* plaintiff, the owner of the affected shore property. The spillage came to rest upon the property of one party, and was then removed by a second party—the sticky-footed interlopers—onto the property of still a third party, the plaintiffs in this case. Arguably such injury is a foreseeable consequence of the spill, but its nexus with the spill is a step removed, and so the plaintiffs are beyond the ambit of permissible claimants under *Testbank*.

I would hold that these claimants cannot recover general economic losses attributed to the general loss of custom attending the spill because they have no physical injury within the meaning of *Testbank*. I would affirm the summary judgment for defendants, to this extent, allowing them to proceed only with their claim for losses attributable to actual physical injury and any losses which *that* physical injury cause. I would not allow recovery for losses attributable to the general loss of customers resulting from the spoiled beach.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-2450
88-2515

In the Complaint and Petition of LLOYD'S LEASING LIMITED, As Owner, and Cammell Laird Shipbuilding, Ltd., et al, Petitioners-Appellees,

v.

CONOCO, Claimant-Third Party Defendant-Appellee

v.

Bob WHITE et al., Claimants-Third Party Plaintiffs-Appellants,

U.S. ARMY CORPS OF ENGINEERS, Lake Charles Pilots, Inc. and Simrad Subsea, Inc. of Oslo Norway, Third-Party Defendants-Appellees.

In the Complaint & Petition of LLOYD'S LEASING Ltd., etc., et al., Petitioners-Appellees,

v.

Willis LUCAS, et al., Claimants-Appellants.

Nos. 88-2450, 88-2515

FILED
MAY 19 1989

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Appeal from the United States District Court for the Southern District of Texas

- - - - - - - - - - -

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 4, 5 Cir., 1989, ____F.2d____)

(MAY 19, 1989)

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX C

In the Matter of the Complaint & Petition of LLOYD'S LEASING LTD., as Owner & Cammel Laird Shipbuilders., Ltd. and Alvenus Shipping Co., Ltd., As Charterers or Owners Pro Hac Vice, of the M/T ALVENUS, Her Engines, Tackle, etc., In a Cause of Exoneration From or Limitations of Liability.

No. Civ. A. G-84-293.

United States District Court,
S.D. Texas,
Galvestson Division.

Jan. 22, 1988.

During limitation of liability action by owner and charterer of tanker whose cracked hull caused oil spill which was beached at city, petition for summary judgment as to claims was filed. The District Court, Hugh Gibson, J., held that: (1) recovery was denied to persons who claimed economic damage exclusive of physical damage; (2) damages caused by tracking the oil deposit from beach were not foreseeable; (3) state was proper party to assert loss of sand and beach; (4) direct physical damages were recoverable; and (5) class certification was denied to shrimpers allegedly injured by the spill.

So ordered.

1. Navigable Waters 35

Owner and charterer of oil tanker which had cracked

hull and caused oil spill which beached was not liable to those persons who claimed economic damage exclusive of any physical damages by the effects of the oil on the beach.

2. Navigable waters 35

Damages to property resulting from persons tracking oil deposit from city beaches onto property, following beaching of oil spill caused by tanker with cracked hull, were not sufficiently foreseeable to allow recovery in limitation of liability proceeding; third-party intervention which allowed oil to be carried from beaches to claimants' property broke chain of foreseeability.

3. Navigable Waters 35

State, not private citizens, was proper party to assert loss of sand, loss of beach, loss of vegetation and resulting economic loss caused by beaching of oil slick after tanker developed split in its hull and spilled oil off shore.

4. Navigable Waters 35

Direct physical damages resulting from beaching of oil slick caused by tanker with cracked hull which was carried to beach by currents and waves were foreseeable and recoverable in limitation of liability proceeding.

5. Federal Civil Procedure 181

Shrimpers whose businesses were allegedly damaged by arrival of oil slick caused by leading tanker were not entitled to class certification in limitation of liability proceeding; presence of only six shrimper plaintiffs after publicity attending spill and repeated notices demonstrated that class certification would not advance

the litigation. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Charles R. Houssiere, III, Houstson, Tex., for White, et al.

Mike Gallagher, Fisher, Gallaher, Perrin & Lewis, Houston, Tex. for J.L. Sasser.

Susan Thiesen, Asst. Atty. Gen. and Ben F. McDonald, Jr., Sp. Asst. Atty. Gen., Atty. General's Office, Austin, Tex. for State of Tex.

H.S. Morgan, Jr., Theodore G. Dimitry, Vinson & Elkins, Houston, Tex., for Conoco.

George W. Lederer, Jr., Paul W. Wommack, Ralph K. Harrison, The Woodlands, Tex., for Mitchell Development Corp. of the Southwest, Mitchell Realty Co., The Fort Crockett Hotel Ltd., and George P. Mitchell.

Charles Houssiere, Houssiere & Durant, Houston, Tex., for Earl Stark.

Steve Williams, for City of Galveston.

Ervin A. Apffel, Jr., McLeod, Alexander, Powel & Apffel, Galveston, Tex. for Mitchell Duncan, Ski Trek, Inc. and City of Galveston.

Gordon Speights Young, Jack Shepherd, Houston, Tex., R. Scott Blaze, Trial Atty., U.S. Dept. of Justice, Washington, D.C. for U.S.A, U.S. Army Corps of Engineers, Colonel Eugene Witherspoon.

Beck Smith, Smith & Stowers, Galveston, Tex., for David Richard, Theo Carroll White, Charles Richard and Billy Kesel.

Lester J. Lautenschlaeger, Jr., Lautenschlaeger & Oberhelman, New Orleans, La., for third party defendant Malcolm Gillis and Lake Charles Pilots, Inc.

James Patrick Cooney, John M. Elsley, Royston, Raynor, Vickery & Williams, Housston, Tex., for third party Silver Line, Ltd., and Silver Navigation, Ltd.

MEMORANDUM AND ORDER

HUGH GIBSON, District Judge.

The genesis of the current limitation of liability action before the Court is to be found in 1984 when the M/T ALVENUS, on a voyage from Venezuela to Lake Charles, Louisiana, sustained a crack in her hull while in the Calcasieu Pass Channel of the Gulf of Mexico. The epicenter of the resultant oil spill was approximately seventy miles distance from Galveston, Texas, and took several days to reach the coastal city. Over 375 "Galveston" claimants have filed claims against petitioners alleging damages of varied and sundry natures.

Petitioners have filed four motions for summary judgment, two of which were granted by this Court on November 20, 1987. Claimants, in response, have filed a joint motion to vacate and set aside the November orders. Six of the claimants have also filed a motion for class certification. The ensuing responses and replies have become "fragmented" and have led "to a confused presentation." Cononco's Reply Memorandum to Pollution Claimants' Responses to Motion for Summary Judgment. In order to

clarify the present legal and factual conundrum, the Court will lay forth the legal principles by which it will decide the case *sub judice.*

Petitioners have placed the claimants in three categories based on the alleged damage suffered.[1] The Court, although declining to follow petitioners' classification scheme, will, likewise, categorize the claimants in question according to damages suffered. Claimants will be classified in the following manner:

> (1) those who suffered economic loss exclusive of physical damage;
> (2) those who suffered "tracking" damages and resultant economic loss; and
> (3) those who suffered direct physical impact damages and resultant economic loss.

Thus, two of the three groups of claimants have suffered some type of physical damage in addition to the alleged economic loss.

(1) As to the first category of claimants, *State of Louisiana ex rel Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir.) *(en banc), cert. denied,* 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986) controls. The Court, in *Testbank,* held that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort." 752 F.2d at 1020. the claimants in the first category are, therefore, precluded from seeking economic damages and the Court's summary judgment order of November 20, 1987, dismissing claimants therein

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[1] A fourth category is based upon a group of claimants who allegedly failed to respond to petitioners' interrogatories. As to this fourth category, petitioners seek default judgments

will be left undisturbed. Those claimants who are of the opinion that they should not be considered under the first category of claimants as delineated by the Court should file individual, specific motions for reconsideration within twenty (20) days of the date of this order.

In *Consolidated Aluminum Corp. v. C.F. Bean Corp.* 772 F.2d 1217 (5th Cir. 1985), the Court determined that *Testbank* did not apply because plaintiff had "suffered physical harm to property in which it [had] a proprietary interests." *Id.* at 1222. The harm to plaintiff in *Consolidated* consisted of damage to the physical equipment at plaintiff's aluminum plant. *Id.* at 1218. the Fifth Circuit remended the case for analysis under traditional tort principles applied in admiralty. *Id.* On a second appeal, the Fifth Circuit affirmed the trial court's finding that the damage to plaintiff in *Consolidated* was not foreseeable as a matter of law. *Consolidated Aluminum Corp. v. C.F. Bean*, 833 F.2d 65, 68 (5th Cir.1987), *Aff'g*, 639 F.Supp. 1173 (W.D.La. 1986). The Fifth Circuit, in affirming the district court, perceived harm

> "to be the foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention."

Consolidated, 833 F.2d at 68. Applying the above definition, the Court concluded that the damage to plaintiff was "beyond the pale of general harm which reasonably might have been anticipated . . . " *Id.*

[2] In 1984, the vagaries of winds and currents

caused the beaches of Galveston and the surrounding areas to be inundated with crude oil from a cracked tanker hull seventy miles away. The second category of claimants suffered physical damage as a result of third parties "tracking" oil into claimants' businesses and condominiums and onto the personal property therein. "To be found liable, a defendant must have "knowledge of a danger, [the danger is] not merely possible but probable. . . ' "*Id.* (citing *Republic of France v. United States,* 290 F.2d. 395, 401 (5th Cir.1961)). In view of the above interplay of human intervention and Nature's capriciousness, the Court finds as a matter of law that the damages, both physical and economic, resulting from the tracking of oil were not foreseeable. In this instance, the tracking damages were indeed possible, but in no fashion probable. The element of third-party intervention that allowed the oil to be carried from the beaches to the claimants' businesses and condominiums broke the chain of foreseeability. The Court, therefore, modifies its partial summary judgment order of November 29, 1987, so as to DISMISS claimants, not just certain claims, who seek damages for physical and economic damages.[2]

[3] A companion order will be entered dismissing claimants who seek, in addition to tracking damages, recovery for damage to the public beaches such as loss of sand, loss of beach, loss of vegetation and the alleged resultant economic loss. The party to seek damages of this nature is the State of Texas, not private citizens. Furthermore, the Park Board of Trustees of the City of Galveston is REINSTATED in the current cause as a claimant. Prior summary judgment orders entered against, the Park Board

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[2] The Court finds that the damages sought pursuant to theories of Intentional tort and public or private nuisance are simply not sustainable under the pleadings of this case nor under *Testbank. See Tesbank,* 752 F.2d 1019, 1030-31.

are, therefore, VACATED, but only insofar as they affect the Park Board, unless otherwise stated. Finally, claimants who are of the opinion that they do not fall into this second category of claimants shall file individual, specific motions for reconsideration with twenty (20) days of the date of this order.

[4] The direct physical impact of oil on various instrumentalities, e.g. the hulls of boats, was precipaitated without the aid of third-party human intervention but, instead, flowed directly from the M/T ALVENUS via currents and waves. The foreseeability chain, in regard to direct physical impact damages, remains unbroken and petitioners, therefore, liable. Under *Consolidated,* 833 F.2d at 68, the Court finds that both physical and economic damages sustained as a result of the direct physical impact of oil are recoverable. Sea-Arama, Inc., who seeks recovery for costs incurred in the removal of oil from water intake valves and the resultant economic damages, will be allowed to continue as a claimant in the present case. Prior summary judgment orders entered against Sea-Arama are, therefore, VACATED. Such orders are vacated only as to Sea-Arama, Inc., unless otherwise stated. All claimants who have suffered direct physical impact damages, as described above, and have been dismissed in prior summary judgment orders shall file individual, explanatory motions for reconsideration within twenty (20) days of the date of this order.

[5] Claimants' motion for class certification on behalf of James Bates, et, al., fails in several respects. Under Rule 23(a)(1), Fed.R.Civ.P., a class action may be maintained if "the class is so numerous that joinder of all members is impracticable." Since 1984, only six claimants in the class seeking certification, shrimpers in Galvestson, Harris and Chambers County, have come forth. No credible attempt

has been made by movants to demonstrate that the six claimants are representative of a vastly larger "hidden" class of shrimpers who have failed to file actions as claimants. The publicity surrounding the *Alvenus* oil spill and the necessary prerequisites, including repeated notices in local papers, to the petition for limitation of liability would seem to have brought forth those shrimpers who a interested in pursuing their claims. Certification of a class of shrimpers at this late date would in no way advance the litigation of this cause or protect the rights of a possible class. Furthermore, in *Lykes Bros. Steamship Co., Inc., v. Tug Bayou La Fourche,* 1974 A.M.C. 1783, 1786 (S.D.Tex.1974). Judge Singleton found a "class claim" inappropriate and directly contrary to the purpose of a limitation suit. The Court, for these reasons, respectfully DENIES claimants' motion for class certification at this time.

Finally, the Court, on the basis of the record as it currently exists, DENIES petitioners' motion for entry of default judgment against those claimants who have failed to respond to petitioners' interrogatories. Claimants who have failed to respond are, hereby, ORDERED to RESPOND within twenty (20) day s of the date of this order. Failure to respond will, once again, subject these claimants to dismissal.

APPENDIX D
NOS. 88-2515/88-2450

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

IN THE COMPLAINT AND PETITION OF LLOYDS LEASING, LTD., AS OWNER AND CAMMEL LAIRD SHIPBUILDERS, LTD. AND ALVENUS SHIPPING COMPANY, LTD., AS CHARTERS AND OWNERS *PRO HAC VICE* OF THE M/T ALVENUS, HER ENGINES, TACKLES, ETC.

VS.

CONOCO, INC.

Appellees/Third Party
Defendants/Claimants

VS.

WILLIS LUCAS, ET AL

Appellants/Claimants/
Third Party Plaintiffs

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW Appellants and file this Motion for Rehearing directed to this Court's judgment and opinion dated April 4, 1989 and would show as follows:

REHEARING ISSUE 1

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE APPELLEES DID, IN FACT, OWE A DUTY OF DUE CARE TO APPELLANTS AND THEIR PROPERTY IN THIS MASSIVE OIL SPILL DISASTER, THE COURT OF APPEALS APPLYING A NEW AND INCORRECT LEGAL STANDARD TO THIS MATTER.

REHEARING ISSUE 2

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE APPELLANTS' "TRACKING DAMAGE" WAS FORESEEABLE AND APPELLEES' CLAIMED INABILITY TO PREDICT THE EXACT SPOT WHERE THE OIL SPILL WOULD WASH ASHORE DID NOT RENDER THE "TRACKING DAMAGE" UNFORESEEABLE AS A MATTER OF LAW.

REHEARING ISSUE 3

THE COURT OF APPELAS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE COMPLEX CASES INVOLVING MASSIVE OIL SPILLS SHOULD NOT BE DECIDED ON SUMMARY JUDGMENT, OUR SUPREME COURT GENERALLY DIRECTING THAT "ISSUES OF FAR FLUNG IMPORT" SHOULD NOT BE DECIDED ON SUMMARY JUDGMENT AS A MATTER OF "GOOD JUDICIAL ADMINISTRATION".

REHEARING ISSUE 4

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE THIRD PARTY HUMAN INTERVENTION (PEOPLE TRACKING OIL OFF OF BEACHES ADJACENT TO HOMES AND BUSINESSES INTO THOSE HOMES AND BUSINESSES) DID NOT BREAK THE CAUSAL CHAIN OF FORESEEABILITY AS A MATTER OF LAW.

ARGUMENT AND AUTHORITIES

I.

GENERALLY

The panel majority calls for 'far-reaching exoneration of the shipping industry from responsibility" for massive oil spills, [1]in keeping with Judge Gee's concurring *Testbank*[2] opinion, suggesting rules to bar recovery in "disaster" cases.[3] The import of the majority opinion is that anytime an oil tanker owner/operator is unable to predict with exactitude the oil spill's ultimate, precise landfall, oil spill harm is not foreseeable as a matter of law; thus, the tanker owner/operator owes shoreside victims "no duty" and is absolved from liability.[4] The majority's rationale and holding is contrary to settled principles of tort law and Fifth Circuit precedent. Indeed, the majority's new test would exonerate one from shooting a gun into a crowd because it was unpredictable who the bullet would hit.[5] The majority opinion is also contrary to Supreme Court guidance *against* Summary Judgments in complex cases of "far-flung import".

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[1] *Slip. Op.*, at 2714 (Higginbotham, J., concurring and dissenting in part).

[2] *State ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc) (Maj. op. by Higginbotham, J.).

[3] *Id.*, at 1032-33 (Gee, J., concurring).

[4] *Slip Op.*, at 2714.

[5] *Id.*, at 2714.

II.

PROFOUND ISSUES OF PUBLIC IMPORT SHOULD NOT BE DECIDED BY SUMMARY JUDGMENT

The Coast Guard accurately called this a "major" oil spill. (Suppl. Tr. — *Coast Guard Report*, at 2). A major oil spill is a disaster, because so much harm is caused to individuals, businesses, the economy, and the environment. Here, for example, Appellees spilled 2-3 million gallons of oil near the Gulf Coast, causing literally a disaster across a broad sweep of every aspect of life in the affected area.

Where cases involve complex issues of profound public import, our Supreme Court cautions *against* summary disposition. The reason for this salutory caution is clear:

> *(S)ummary Judgment procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import* . . . . We consider it . . . good judicial administration to withhold decision of the ultimate questions . . . until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.
>
> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be *lacking in the thoroughness* that should precede judgment of this importance and which it is the purpose of the judicial process to provide. (emph. added).

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7 (1948); *Anderson v. Liberty Lobby*, 477 U.S. 242 255 (1986) (citing

Silas with approval); *Arenas v. U.S.*, 322 U.S. 419, 434 (1944) ("duty of court . . . can be discharged in a case of this complexity only by trial. . . . ", reversing Summary Judgment).[6]

At bar, *Kennedy's* cautionary principle has not been applied. Instead, the majority decides what everyone agrees was a disaster — on a "treacherous" record composed of affidavit and attorney argument. This was error and not *Kennedy's* good judicial administration".

III.

THE ULTIMATE IRONY

The ultimate irony appears at bar in the distinction between the trial court ruling being appealed and the fulcrum of the majority opinion — a matter no one appealed from.

Tracking Damage	Oil Spill "Bullet" Hits Galveston
Trial Court Not Foreseeable[7]	Foreseeable[8]

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[6]This is also the Fifth Circuit rule. *U.S. v. Fryd Constr. Corp.*, 423 F.2d 980, 984 (5th Cir. 1970); *Heywood v. Pub. Housing Administration*, 238 F.2d 689 698 (5th Cir. 1956):

[7]Order of 1/22/88 at 4:

> "as a matter of law, . . . the damages . . resulting from the *tracking of oil* were not foreseeable. *** The element of third party intervention that allowed the oil to be carried *from the beaches* to claimants' businesses and condominiums broke the chain of foreseeability". (emph. added).

[8]Orders of 1/22/88 and 10/27/88, allowing certain Galveston claimants to recover for physical harm and damage due to oil-laden windblown mist.

Panel Majority Foreseeable[9] Not Foreseeable[10]

The dissent noted the disparity between the decision appealed from and the basis of the majority opinion *(Slip Op.*, at 2713-14).

The gist of the trial court Order appealed from was the precise holding that

> ***The element of *third party human intervention* that allowed the oil to be carried from the beaches to . . . (Appellants') businesses and condominiums *broke the chain of foreseeability.* (emph. added).

Order of 1/22/88, at 4. Clearly, the basis of the trial court's Order was "third party human intervention". Appellants, however, had submitted a hosts of expert affidavits that "tracking damage" (i.e., tracking oil from the beaches to Appellants' homes and businesses) was — indeed — a "common", "very likely" and "highly probable" result of a massive oil spill.[11] The entire panel agrees that this is a "common sense conclusion".[12] Thus, the very *basis* of the

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[9] *Slip. Op.*, at 2713. Judge Higginbotham (concurring and dissenting) also agrees that Appellants' "tracking damage" was foreseeable *(Slip. Op.*, at 2714).

[10] *Slip. Op.*, at 2713.

[11] Tr. 1165-76 (i.e., U.S. Coast Guard Veteran of 20 years experience in oil spill investigation and clean-up, president of oil spill clean-up company involved in over 100 oil spills, college professor training oil spill clean-up personnel for 11 years, etc.).

[12] *Majority*, at 2713; *Dissent*, at 2714.

trial court Order has been burst on appeal[13] and remand should have resulted.

The majority (perhaps in keeping with the *Testbank* concurrence) reached beyond the trial court holding being appealed to produce a far-reaching exoneration of the shipping industry from oil spill liability. Appellants certainly did not appeal the trial court decision that oil on Galveston beaches was foreseeable and Appellees launched no cross-appeal on the matter.

IV.

FORESEEABILITY: THE "CONSOLIDATED" TEST AND THE MAJORITY'S "NEW"ONE

As announced in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987):

> harm . . . (is) . . . foreseeable . . . if (1) harm of a *general* sort (2) to persons of a *general* class (3) *might* have been anticipated by a *reasonably thoughtful* person, (4) as a *probable* result of the act or omission, (5) considering the interpllay of *natural forces* and *likely human intervention.* (numbering and emph. added).

The majority, based on the "general class" of victims element,[14] reasoned that if oil spill landfall at Galveston was not *predicated with certainty,* then harm to the Galveston Appelants was not — as a matter of law —

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[13] *See, e.g., Nunley v. M/V Dauntless,* 727 F.2d 455 (5th Cir. 1984) (*Rest. of Torts2d* §§442, 447); *Watz v. Zapata Offshore Co.,* 431 F.2d 100 (5th Cir. 1970) (adopting *Rest. of Torts2d* §435[i]).

[14] *Slip. Op.,* at 2713.

foreseeable. this "certainty" requirement is *not* the *Consolidated* standard. The new standard deletes *Consolidate's* "general class" element, substituting an onerous "predictable with certainty" element.

Consolidated's "general class"[15] is made up (at bar) by Gulf Coast individuals and businessses. Unlike the majority, *Consolidated* does not require the victims to be identified with exactitude — prior to the oil spill landfall — but only that the "general class" of victims be identifiable. *cf: Testbank, supra* at 1026 (general class of "commercial fishermen were foreseeable, Plaintiffs whose interests . . . (Defendant) had a duty to protect. . . . ").

The majority's new standard reasons that one's harm is not foreseeable as a matter of law — anytime the tortfeasor cannot predict the exact spot where harm would be felt.[16] Under this new standard, a Defendant shooting a gun into a crowd would be absolved from liability because he did not know precisely who the bullet would hit! While such might meet the suggestion in Judge Gee's *Testbank* concurrence, it is not the correct "foreseeability" test.[17]

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[15] It is noteworthy that *Consolidated* dealt with persons and businesses suffering harm up to *6 miles* inland; Appellants at bar suffered harm within *300 yards* inland.

[16] *Slip. Op.*, at 2714.

[17] The panel majority agrees that "Appellee might reasonably anticipate that the oil might wash ashore somewhere. . . " (*Slip. Op.*, at 2713) but concludes that since the precise coastal point to be hit by the oil spill "bullet" was not foreseeable, neither was the harm. (*Id*). Thus, the panel majority reasons that — since Appellees did not precisely know that the oil spill would wash ashore in Galveston— Appellants' harm was not foreseeable and Appellees were absolved of liability.

V.

THE COAST GUARD REPORT: ACCURATE PROJECTIONS NOT IMMEDIATELY AVAILABLE BUT CONCERN FOR GALVESTON RAISED 1 DAY AFTER SPILL

The Coast Guard Report reflects that the computer — generated "modeling and simulation studies" were produced in Seattle, Washington (*Coast Guard Report*, Appendix IIB). The "studies " did *not* include "on scene" observations, and specifically noted that

> (t)o improve the *accuracy* of these trajectory estimates, *on scene* observations . . . *are necessary.* With such date . . . *forecasting procedures could be initiated.* . . . (emph. added).

While accuraate projections were not available (due to lack of computer staff on-site observations),[18] the Coast Guard raised concern for damage to Galveston as early as July 31st — *1 day* after the spill! (*Coast Guard Report*, at 4). On August 1st, the computer staff met with Galveston officials (*Id.* at 5). On August 2nd "boom deployment" at Galveston Bay was planned. *(Id*, at 6) and a formal "alert" issued to Galveston officials (*Id*, at 6-7). The next day — August 3rd — "the (tanker) owners' representatives established a command post . . . in Galveston" and began hiring cleanup crews. (*Id*, at 7) "Over 200 miles of coastline" was at risk (*Id).* That day — August 3rd — oil began to wash ashore in Galveston (*Id*).

Thus, while the majority adopts Appellees' loose reading of a map as the fulcrum for the decision, the Coast Guard was expressing concern for oil spill harm to

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[18] This was remedied by the agreement of the computer staff to come to Texas on August 1st. (*Coast Guard Report*, at 4-5).

Galvesston as early as July 31st — 1 day after the oil spill!

VI.

1-IN-5 PROBABILITY OF HARM IS NOT ENOUGH FORESEEABILITY AS A MATTER OF LAW?

Using Appellees' argument (based loosely on a map), the majority relied on "data" reflecting a 1-in-5 probability of harm to populated Gulf Coast areas like Galvestson.[19] This 20% chance of harm is not enough foreseeability — as a matter of law — under the majority's new test' a 20% chance of harm, thus, presents *no* fact issue to bar Summary Judgment! this new standard is accurately portrayed by the dissent as enough to relieve one of liability for shooting into a crowd, simply because the tortfeasor may not have been exactly sure who the "bullet" would hit.[20] Clearly, the majority's new standard is simply an exoneration of the shipping industry from oil spill responsibility.[21] *cf: Testbank, supra* at 1032-3 (Gee, J., concurring).

WHEREFORE PREMISES CONSIDERED, Appellants pray that Rehearing be granted and, upon such, the April 4th majority opinion be vacated, the trial court judgment be reversed and remanded, costs be assessed against Appellees and for such other and further relief as may be just.

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19 *Slip. Op.*, at 2713 (340 miles of coastline, 60 miles being populated, yields an approximate 1-in-5 probability of oil spill landfall).

20 *Slip. Op.*, at 2714.

21 *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX E

"TRACKING DAMAGE" CLAIMANTS

1. Willis Lucas, Individually and d/b/a The Reef Condominium Association.

2. The Commodore Hotel, a partnership.

3. Las Palmas, Inc.

4. Galvestson First Financial Corp. d/b/a Econo Lodge of Galveston.

5. Leisure Services, Inc.

6. Larry L. May d/b/a May's Concessions.

7. Pam Walker, Individually and d/b/a Beach Pocket park #1 Concession, a partnership.

8. Carolyn Johnson, Individually and d/b/a Beach Pocket part #1 Concession, a partnership.

9. Dennis Swearingen, Individually and d/b/a Beach Pocket park #1 Concession, a partnership.

10. GTG/Sanric Galveston Joint Venture d/b/a Ramada Inn.

11. Beryl Ames.

12. Morris L. Bayard.

13. Russell S. and Barbara P. Bentley.

14. William H. Berry.

15. Jane S. Bickel.

16. Margaret P. Buchanan.

17. Richard L. Burleson.

18. Leoncio Z. Campos.

19. Herbert V. Carson, Jr.

20. Douglas H. Cashmore.

21. Fred A. and Iva Cash.

22. Archie T. Chapman.

23. Walter C. Cherry.

24. Thomas J. Couinard.

25. Marion R. Clark.

26. Charles F. Cole.

27. Walter C. Corbin.

28. P. Richard and Carolyn M. Dalton

29. Jerald L. Darnold.

30. Carol L. Davis.

31. David F. Decort.

32. John D. Dedivitis.

33. Melba Joy Derrick.

34. Jack Q. Dunaway.

35. Mitchell Duncan.

36. Roger M. Feig.

37. Anthony and Margaret Filyk.

38. John M. Floyd.

39. Emery and Lillian Fontenot.

40. Stephen Greenberg.

41. Phillip E. Grossman.

42. J. M. Haggard.

43. Garnet M. Heishman.

44. Michael T. Hennings.

45. Mack D. Hickman.

46. Sally A. Hintz.

47. Dennis O. and Diane K. Holiday.

48. Diane M. Hood.

49. Thomas Grant Johnson.

50. Vance Jow.

51. Vic F. Jue.

52. Joseph L. Jurica.

53. Charles R. Kelly.

54. Anthony M. Kindred.

55. Cliff C. and Hazel S. Laborde, Jr.

56. Paul R. Lawrence.

57. Saul G. Levin.

58. Michael A. Levine, M.D.

59. Charles J. Loew.

60. Ronald Eugene Lohec.

61. William S. Magness.

62. Hugh L. Mayo.

63. Luc C. R. Mazzini.

64. Carol McAndrews.

65. Jerry P. and Constance A. Metz.

66. Thelma M. Moore.

67. Delilah J. Morgan.

68. Robert Norris.

69. James K. Owens.

70. Lorraine Panfilli.

71. Archie F. Panfilli, Jr.

72. Mark A. and Karen M. Peterson.

73. Roger and Jill Peterson.

74. Robert J. Phillips.

75. Horacio A. and Carole B. Prado.

76. Tom W. Ritter.

77. John M. T. Rosl.

78. Thomas V. Ryan.

79. Anthony D. Sabino

80. Joseph J. Saia.

81. Bobby S. Sallee.

82. J. H. and Lindsay Samuel.

83. Frank G. Satterfield.

84. Harold H. Schierloh.

85. Donald S. Schiller.

86. Arthur J. Schroeder.

87. Walter A. and Leona F. W. Schroeder.

88. Richard Scobey.

89. Robert R. Scott.

90. Charles E. Shaver.

91. Hasdell Sheinberg.

92. Billy Bob Shiflett.

93. Louis A. Sordahl.

94. Gerald W. Spotts.

95. Dennis S. Stepanik.

96. Stanley R. Strassburg.

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100. R. E. Sullivan, M.D.

101. Alan L. and Renee N. Tucei.

102. Neal Lloyd Wallach.

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104. Douglas Watts.

105. Kenneth W. Westra.

106. Cyril Wolf.

107. David L. Wolf.

108. James A. Woodward.

109. Eugene J. Woznicki.

110. Rajendran and Poh-Chooh Ambiavagar.

111. Hal F. Anders.

112. Ivan Dale Browne.

113. Julian Byrd.

114. C. Ronald Capps.

115. Charter Financial Group.

116. David Cisco.

117. Robert W. Clum.

118. Melvin E. and Mary Cowart.

119. Clark Griswold.

120. Robert A. Gritta.

121. Stephen W. C. Holbrook.

122. Charles Hunsinger.

123. Ralph Douglas James.

124. Leonard Leon.

125. Raymond Ludena.

126. Roy McIntosh.

127. Charles E. Neumann.

128. Hugh E. Parsons.

129. Richard C. Redpath.

130. Ernest Richardson.

131. Raul Rivera.

132. Richard Rothfeld.

133. Walter J. Teachworth, Individually and d/b/a Sherwood Village.

134. Ann Keeling.

135. James Karolik.

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CAUSE NO. 88-2450

IN THE COMPLAINT AND PETITION OF LLOYDS LEASING, LTD., AS OWNER AND CAMMEL LAIRD SHIP-BUILDERS, LTD. AND ALVENUS SHIPPING COMPANY, LTD., AS CHARTERS AND OWNERS *PRO HAC-VICE* OF THE M/T ALVENUS, HER ENGINES, TACKLES, ETC.

Appellees/Petitioners

V.

CONOCO, INC.

Appellees/Third Party
Defendants/Claimants

V.

BOB WHITE, ET AL

Appellants/Claimants/
Third Party Plaintiffs

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, APPELLANTS, BOB WHITE; JAMAICA BEACH IMPROVEMENT COMMITTEE; GEORGE M. WILSON; JOSEPH A. SHAIA; CAPTAIN TOM E. DORAN; WINDSOR T. and HELEN M. ANDERSON; WILLIAM J. HITZHUSEN; MARION TRAVIS and DOLORES ANN PAIR; JERRY KNAUFF; DWIGHT R. BOREL; FRANCIS M. DARR, JR.; GORDON SCHRADER; WILLIAM C. SHADDOCK; ROBERT J. MOORE; JERRY R. SCHRADER;

LAWRENCE R. ELBERT; BRIGGS MOTOR COMPANY; JAMES DAVID BRIGGS AND HUGH ROGERS FERGUSON as Independent executors of the Estate of Luella Grace Briggs, hereinafter Appellants, and files this their Brief in the